

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RALPH L. HICKS,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

(CSA 2 137 666)

DOCKET NUMBER  
AT831M8910479

DATE: MAR 29 1990

Ralph L. Hicks, Esq., Cashiers, North Carolina, pro se.

Jane N. Lohr, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

Background

The appellant appealed the Office of Personnel Management's (OPM) reconsideration decision finding that he had been overpaid \$4,322.00 in civil service annuity benefits. The administrative judge upheld the agency determination and the appellant filed a petition for review. For the reasons discussed below, the appellant's petition for review is DENIED. The Board REOPENS the case on its own motion pursuant to 5 C.F.R. § 1201.117 and AFFIRMS the initial decision.

The facts in this case are not in dispute. The appellant retired from the civil service in 1978 after military service from 1945 to 1965 and civilian service from 1965 to 1978. His civil service annuity is, therefore, based in part on post-1956 military service. In 1986 the appellant attained the age of 62. On June 1, 1987, OPM notified him that his civil service annuity would be reduced since he was 62 years old and was eligible for social security benefits.<sup>1</sup> OPM also indicated that the appellant's future annuity payments would be reduced to collect an overpayment of \$4,322.00 caused by the agency's failure to reduce his annuity when he turned 62. See Appeal File Tab 5, Subtab 2b. The appellant requested reconsideration of the initial OPM decision. The reconsideration decision affirmed the initial decision and the appellant then appealed to the Board's Atlanta Regional Office.

OPM maintained that the statute required the appellant's civil service annuity be reduced since at age 62 the appellant became entitled, or on proper application would have been entitled, to social security benefits. See 5 U.S.C. § 8332(j). The appellant, however, was unable to collect social security benefits since the income from his job was too high.<sup>2</sup> OPM

---

<sup>1</sup> 5 U.S.C. § 8332(j) requires that the civil service annuity of an individual separated from the civil service before September 8, 1982, whose annuity is based in part on post-1956 military service, be reduced when he or she becomes entitled, or would on proper application be entitled to social security benefits.

<sup>2</sup> The appellant earned in excess of \$42,000 from his law practice in each of the years 1986, 1987, and 1988.

contended that the fact that the appellant was not able to collect social security benefits because of his income is irrelevant since he was eligible for benefits.

The appellant asserted that the statute only required a reduction in the civil service annuity of individuals actually entitled to collect social security payments. The appellant also contended that Congress' intent was to reduce the civil service annuity of individuals actually receiving social security benefits in order to prevent an annuitant from receiving both an annuity and social security benefits based on the same period of Federal service.<sup>3</sup> The appellant also cited an unpublished Comptroller General decision in which it was held that an annuity should not be reduced by more than the amount of social security benefits the annuitant actually receives. See *In re Barbara L. Martin*, No. B-219162 (Comp. Gen. 1986).

The administrative judge upheld OPM's decision. He first found that regardless of the appellant's outside income he would have been entitled to social security benefits had he applied. The administrative judge then noted that deductions from social security entitlements due to work do not reduce the entitlement, merely the amount of the monthly payment. Therefore, the administrative judge found the appellant's

---

<sup>3</sup> The appellant's assertion regarding the purpose of the social security "offset" provision is correct. See 1972 U.S. Code Cong. & Ad. News 3288, 3304. The appellant does not point to any part of the legislative history, and we have found none, suggesting that the civil service annuity of an individual should not be offset unless the individual actually receives social security payments.

civil service annuity is subject to reduction since the appellant is entitled to social security payments.

In his petition for review the appellant asserts that the administrative judge erred in his statutory interpretation, failed to properly consider Congress' intent, and misconstrued the Comptroller General's decision.

#### ANALYSIS

The appellant's contentions are without merit. A fully insured individual who has attained the age of 62, and who files a proper application, is entitled to old age and survivors benefits under the social security system. See 42 U.S.C. § 402(a). It is not disputed that the appellant was 62 years old and that he was fully insured; the only requirement he failed to meet to perfect his entitlement was applying for benefits. There is no requirement, however, that the appellant actually receive social security benefits before his annuity will be offset. 5 U.S.C. § 8332(j) provides for an offset or reduction to the civil service annuity for both those entitled to social security benefits, and those who would be entitled upon proper application. The Board has held that it is the date that an appellant becomes eligible for or entitled to social security benefits and not the date on which he actually receives benefits which is determinative for purposes of 5 U.S.C. § 8332(j). See *Brashears v. Office of Personnel Management*, 30 M.S.P.R. 250, 252 n. (1986); see also *Gray v. Office of Personnel Management*, 29 M.S.P.R. 559, 560-61 (1986) (indicating that the Board uses the terms eligibility and

entitlement synonymously when discussing 5 U.S.C. § 8332(j)). The central issue in this case, hence, is whether the appellant is entitled to social security benefits.

As the administrative judge found, the social security law provides that deductions in social security payments on account of income from employment are made "from any payment ... to which an individual is entitled." See 42 U.S.C. § 403(b).<sup>5</sup> Thus, the statute presupposes entitlement; outside earnings become relevant only as a deduction, up to the amount of that entitlement. The appellant, therefore, was entitled to social security benefits, but the amount of payment was reduced to zero by his income from employment.

The appellant's reliance on the Comptroller General's decision is misplaced. While the Board considers the Comptroller General's decisions persuasive, see *Apple v. Department of Transportation*, 38 M.S.P.R. 229, 233-34 (1988), the decision construes the military annuity statutes and not the civil service annuity statutes and is thus not relevant. Further, OPM is charged by Congress with interpreting the civil service retirement law. The construction given a statute by the agency charged with its interpretation is entitled to great deference unless the interpretation is clearly erroneous. See *Kimsey v. Department of the Interior*, 24 M.S.P.R. 528, 532 (1984). The appellant has failed to show

---

<sup>5</sup> 42 U.S.C. § 403(b) provides that deductions in monthly payments on the account of work "shall be made from any payment or payments under this subchapter to which an individual is entitled...."

that [redacted]'s interpretation is clearly erroneous. In addition, the plain language of a statute controls absent a clearly expressed legislative intention to the contrary. See *Benedetto v. Office of Personnel Management*, 32 M.S.P.R. 530, 534 (1987), *aff'd sub nom. Horner v. Benedetto*, 847 F.2d 814 (Fed. Cir. 1988). We have found no such clearly expressed contrary intent.

ORDER

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

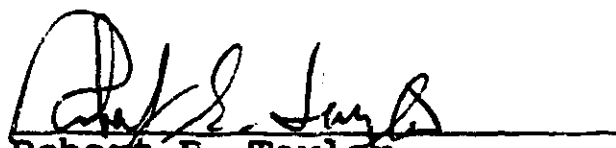
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.